PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

June 5, 2003

Agenda ID#_____
Alternate to Agenda ID #2090
Ratesetting

TO: PARTIES OF RECORD IN APPLICATION 02-09-006

Enclosed is the Alternate Draft Decision of Commissioner Brown to the draft decision of Administrative Law Judge (ALJ) Vieth and the Alternate Draft Decision of Commissioner Lynch previously mailed to you.

When the Commission acts on the draft decision or the alternate, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

As set forth in Rule 77.6, parties to the proceeding may file comments on the enclosed alternate at least seven days before the Commission meeting or no later than June 10, 2003. No reply comments will be accepted. An original and four copies of the comments with a certificate of service shall be filed with the Commission's Docket Office and copies shall be served on all parties on the same day of filing. Anyone filing comments shall electronically serve those on the service list who have provided electronic addresses. Parties shall also ensure that they electronically serve their comments on Commissioner Brown's advisors, Peter Hanson at pgh@cpuc.ca.gov, Belinda Gatti at beg@cpuc.ca.gov and assigned ALJ Vieth at xjv@cpuc.ca.gov. For those who have not provided electronic addresses, printed copies of the comments shall be served by first class mail or other expeditious mode of delivery.

/s/ Angela K. Minkin, Chief
Administrative Law Judge

ANG: vfw

Attachment

Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER BROWN**
(Mailed 6/5/2003)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Wild Goose Storage, Inc., for Review under Public Utilities Code Section 851 *et seq.* of the Transfer of Indirect Control of Wild Goose Storage, Inc., to Encana Corporation or, in the Alternative, Request for Declaratory Order	Application 02-09-006 (Filed September 3, 2002)

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O P I N I O N

I. Summary

We ordered Wild Goose Storage, Inc. (Wild Goose) to file this Application when we issued Decision (D.) 02-07-036, which amended Wild Goose's certificate of public convenience and necessity (CPCN) and authorized Wild Goose to construct and operate an expansion to its existing natural gas storage facility. In today's decision we determine that the holding company merger involving Wild Goose's original, ultimate parent has resulted in an indirect change of control over Wild Goose. Because the merger was finalized in Canada before this Application was filed, we approve the indirect change of control, since review of all of the circumstances indicates that, on balance, it is in the public interest to do so. However, consistent with recent Commission policy, authority is granted on a prospective basis only. To the extent the application requests retroactive authority, this decision denies the application. As prescribed by §§ 2107 and 2108, we levy a $51,500 penalty against Wild Goose for a continuing violation of § 854(a).[1]

II. Background

In D.97-06-091, the Commission granted Wild Goose a CPCN to provide natural gas storage services at market-based rates. Wild Goose was the first independent storage provider to receive a CPCN from the Commission. Recently, in D.02-07-036, the Commission amended Wild Goose's CPCN to authorize, subject to certain conditions, construction and operation of an expansion to Wild Goose's existing gas storage facility. One of the conditions, set forth in Ordering Paragraph 25 of D.02-07-036, stems from trade press reports of

[1] All references to sections are to the Public Utilities Code, unless otherwise indicated.

a pending holding company merger between Wild Goose's ultimate parent and another entity. Ordering Paragraph 25 provides:

> Within 45 days of the date of this order, Wild Goose shall file an appropriate application under Pub. Util. Code §§ 851 *et seq*. for review by this Commission of the impact on Wild Goose of the merger of AEC and PanCanadian Energy Company, forming EnCana Corporation, and for any and all Commission authority required under those statutes.

On September 3, 2002, Wild Goose filed the instant Application in compliance with Ordering Paragraph 25.

III. The Nature of the Transaction and the Relief Requested

A. Overview of the Transaction

From the date of certification and continuing until April 5, 2002, Wild Goose was the wholly owned, indirectly held subsidiary of Alberta Energy Company, Ltd. (AEC). On April 5, 2002, the Court of Queen's Bench of Alberta, Canada approved the merger of AEC and PanCanadian Energy Corp. (PanCanadian), by which the shareholders of AEC received 1.472 shares of PanCanadian common stock in return for each share of AEC common stock they owned. As a result of this transaction, PanCanadian shareholders retained ownership of approximately 54% of the company and the former shareholders of AEC acquired approximately 46%. Shortly thereafter, a majority of the resulting PanCanadian shareholders voted to rename the company EnCana Corporation (EnCana). PanCanadian shares began trading on Toronto and New York stock exchanges under the EnCana name on April 8, 2002.

B. Parties to the Transaction

AEC, Wild Goose's ultimate parent from the time it received its CPCN, is a major Canadian oil and gas producer located in Calgary, Alberta. The merger at the holding company level, which resulted in the formation of EnCana,

has not changed the organizational structure below AEC. AEC owns 100% of Alenco, Inc. (Alenco), a United States subsidiary incorporated in Delaware. Alenco owns 100% of AEC Storage and Hub Services Inc. (now renamed EnCana Gas Storage), which owns 100% of Wild Goose.

Prior to the merger, AEC's shares were publicly traded. AEC is now privately held by EnCana (whose shares are publicly traded). Note 1 to AEC's audited Consolidated Financial Statements for year-end 2001 (Exhibit D to the Application) reports that AEC separates its business endeavors into two groups: (1) North American and international exploration for, and production of, natural gas and crude oil and (2) pipelines and processing operations and gas storage operations. AEC's net capital assets at year-end 2001 were on the order of $11.8 billion dollars (Canadian). Its year-end shareholders' equity was approximately $5.9 billion dollars (Canadian).

PanCanadian's audited Consolidated Financial Statements for year-end 2001 (Exhibit E to the Application) report the financial activities of the company and its subsidiaries in gas and oil exploration, development, production and marketing, including PanCanadian's share of joint endeavors with others. The balance sheet shows net capital assets at year-end 2001 of about $8.1 billion dollars (Canadian) and shareholders' equity of approximately $4 billion dollars (Canadian).

The Application also includes the unaudited financial statements of EnCana for the first and second quarters of 2002 (Exhibit F). The balance sheet reports net capital assets of over $22.1 billion dollars (Canadian) and shareholders' equity of $12.96 billion dollars (Canadian). EnCana's business activities include all of the natural gas and oil ventures of AEC and PanCanadian, with the exceptions of a few discontinued operations. Note 5 of the financial statements reports that these discontinued operations include a

Houston-based energy merchant operation and as well as interests in the Cold Lake Pipeline System and the Express Pipeline System, both oil pipelines located in Canada.

C. Relief Requested

Section § 854(a) requires Commission authorization before a company may "merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state…" The purpose of this and related sections is to enable the Commission, before any transfer of public utility authority is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require. (*San Jose Water Co.* (1916) 10 CRC 56.) Absent prior Commission approval, the transaction is "void and of no effect". Section 854(b) and (c) do not expressly apply to the instant transaction because neither Wild Goose nor any other party to the EnCana merger has gross annual California revenues exceeding $500 million (U.S.).

The Application queries whether the transaction is a change of control under § 854 since AEC continues to own Wild Goose through the same corporate intermediaries as it did before the share exchange and there has been no change in the day-to-day management of Wild Goose. The only change is at the holding company level—AEC, the fourth-tier above Wild Goose in the organizational hierarchy, is no longer the ultimate parent but has become a wholly-owned subsidiary of EnCana.

According to Wild Goose, absent a change in *actual* control, § 854 is inapplicable and so:

> Wild Goose did not file a Section 854 Application with the Commission prior to the share exchange of its parent company AEC with EnCana for the simple reason that a straightforward reading of the statute dictates that it is not relevant to the subject transaction. (Application at 3.)

Wild Goose, by motion filed concurrently with the Application, asks that the Commission issue a declaratory order that disclaims jurisdiction over the transaction. In the alternative, Wild Goose asks that the Commission, following review of the Application, find that the merger is not adverse to the public interest.

IV. Discussion

A. Applicability of § 854

In asserting that there has been no change in control over Wild Goose, and therefore, that § 854 does not apply to this merger, Wild Goose relies on several factors. One, EnCana's shares are widely held and very liquid, as were the shares of AEC when it was publicly traded. Two, the merger has left intact the organizational structure between the gas storage utility and AEC, retaining the same Wild Goose senior management, at least for the present. By analogy to several prior Commission decisions that construe § 854 to apply to a change in actual or working control, and not merely to the power or potential to control, Wild Goose argues that these factors show that no change in control has occurred.[2] Consideration of this argument requires a review of these and other Commission decisions, as well as the factual record provided by the Application as a whole.

Historically, as Wild Goose recognizes, the Commission has determined the applicability of § 854 on a case-by-case basis. Several previous

[2] Wild Goose discusses, in particular, *Paging Network of San Francisco,* D.93-11-063, 52 CPUC 2d 127, 1993 Cal. PUC LEXIS 794 [dismissal appropriate because § 854 inapplicable to distribution of shares of utility's parent corporation from a limited partnership investment fund directly to its partners where no effect on actual or working control of utility's service or operations] and *Crico Communications,* D.92-05-006, 1992 Cal. PUC LEXIS 487 [dismissal appropriate because § 854 inapplicable to public stock offering where original owners retain 20% of utility and no other person or entity acquires control].

Commission decisions explicitly recognize that § 854 does not define "control" and refer to the California Corporations Code for guidance.[3] The Commission has not promulgated regulations to define "control" in terms of a percentage of stock ownership or on the basis of some other, clearly identifiable characteristics. While *Paging Network of San Francisco* and *Crico Communications, supra,* both held § 854 to be inapplicable on unique facts involving a change in the form of ownership but no change in the actual management or control of the utility, review of the larger pool of Commission decisions establishes no bright line.

For example, under diverse fact situations where a public utility owner has either transferred or proposed to transfer a 50% interest in the utility, or has acquired a 50% interest in another utility, the Commission has asserted jurisdiction to review the transaction under § 854 and has approved or disapproved the transfer.[4]

In other proceedings concerning merger at the holding company level or internal reorganization via a holding company, the Commission has tended to analyze the proposed transaction and its effect upon the public utility against

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[3] Corp. Code § 160 defines "control" to mean, alternatively:

a) Except as provided in subdivision (b), "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a corporation.

b) "Control" in Sections 181, 1001, and 1200 means the ownership directly or indirectly of shares or equity securities possessing more than 50 percent of the voting power of a domestic corporation, a foreign corporation, or an other business entity.

[4] *See Application of PacTel Cellular for control of Bay Area Cellular Telephone through Bay Area Cellular Telephone Company,* D.87-09-028, 25 CPUC2d 350, 1987 Cal. PUC LEXIS 197 [definitions of term "control" in the Corporations Code are instructive for purposes of § 854*]*; *Gale v. Teel,* D. 87478**,** 81 CPUC 817, 1977 Cal. PUC LEXIS 152 [public policy implication of transfer warrants review of acquisition of 50% interest in public utility for purposes of § 854]; Dana Point Marin Telephone Co., *D. 83493,* 77 CPUC 347**,** 1974 Cal. PUC LEXIS 829 [Pub. Util. § 854 requires Commission authorization of relinquishment of positive control (100% ownership) for negative control (50% ownership)].

public interest standards associated with § 854.[5] Moreover, in an application under § 852 (which requires any corporation holding a controlling interest in a California public utility to obtain prior Commission authorization before it acquires any part of the capital stock of another California public utility), the Commission expressed concern that blanket authorization for a utility to purchase additional shares in its holding company parent could affect control of the parent, and limited the authorization to five years to avoid conflict with § 854.[6]

Since the Commission's application of § 854, and the degree to which issues of ownership and control have registered concern, all turn on the specific facts at issue, we return to the facts presented by this application. The instant merger has combined two holding companies and their subsidiaries to form EnCana, which is essentially twice as large as either entity standing alone, with sizeable net assets and shareholders' equity, approximately $22.1 billion dollars (Canadian) and $12.96 billion dollars (Canadian), respectively.

Wild Goose accurately points out that all of its shares are held by the same second-tier entity (EnCana Gas Storage, the new name for AEC Storage and Hub Services Co.), whose shares are all held by the third-tier entity, Alenco,

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[5] *See California-American Water Company,* D.02-12-068, 2002 Cal. PUC LEXIS 909 [authority granted under § 854 for RWE Aktiengesellschaft (RWE) to purchase the stock of Cal-Am's parent, American Water Works Co., resulting in the indirect transfer of control of Cal-Am]; *Pacific Pipeline System,* D.02-06-069, 2002 Cal. PUC LEXIS 309 [authority granted under § 854 for internal reorganization resulting in indirect change of control of Pacific Pipeline]. But see *PacificCorp.,* D.01-12-013, 2001 Cal. PUC LEXIS 1070 [pursuant to §853, transfer of all the stock of PacifiCorp to a new subsidiary of the ultimate parent exempt from §854 review because no change in California operations, etc.].

[6] San Jose Water Co., D.94-01-025, 53 CPUC 2d 37, 1994 Cal. PUC LEXIS 43 [re. San Jose Water's request to invest in dividend reinvestment plan of its parent, California Water Service Co.].

whose shares are all held by the fourth-tier entity, AEC. AEC's shares are no longer publicly traded; instead they are privately held at the new, fifth-tier by EnCana, which is publicly traded. But do these facts, coupled with the fact that EnCana shares are widely held, really mean that no change of control over Wild Goose has occurred?

The Application does state that the retirement of the former Chairman has resulted in one change to the Board of Directors of Wild Goose, though reportedly not as a direct result of the merger. Changes also have occurred on the AEC Board, now that it is wholly owned by EnCana, but the Application states: "it is not anticipated that the changes at the AEC Board of Directors level will impact the manner in which Wild Goose is currently managed." (Application at 14.) We do not expect Wild Goose to file an application each time a board member changes, but as a result of the merger, the reality is that the parent company now has the ability to control its subsidiaries. If AEC was a significant participant in the North American oil and gas industry prior to the merger, the post-merger EnCana is an even more significant presence.

D.02-07-036, which approved the Wild Goose expansion, examined the highly concentrated geographic market for storage services (both injection, withdrawal and inventory) in northern California and all California. While D.02-07-036 was unable to definitively conclude whether Wild Goose had market power and could exercise it, that decision underscored the need to closely monitor the evolving gas storage market within the context of changes in the larger natural gas market. If we were to disclaim jurisdiction over this indirect change of control, we would never examine whether the holding company merger raises market power issues for California.

Given this context, we conclude the Commission would be remiss to disclaim jurisdiction but should examine the parties to the merger and what consequences, if any, the merger has for California and the natural gas market in this state. As we stated in D.03-02-071, our recent decision on the indirect change of control of Lodi Gas Storage, L.L.C. (Lodi), which is the other independent gas storage provider in California:

> We think it prudent public policy to review and approve changes in the ownership and control of certificated natural gas storage utilities, whether those changes occur directly, or indirectly through corporate intermediaries. Such review should help to ensure the continued economic viability of such utilities and to prevent market manipulations that may affect not only their own customers but also larger ratepayer groups. (D.03-02-071, *mimeo.,* at 11-12.)

Moreover, were we to accept Wild Goose's argument that jurisdiction over this matter could be reduced to a simplistic, structural assessment to establish whether an actual versus potential change of control has occurred, we would be creating the wrong standard, which could only too easily be misused by those who might seek to similarly structure a transaction to immunize it from Commission review. Therefore, we reiterate the need for case-by-case review of mergers that fit the structural pattern exemplified by this one.

Below, in part B, we review the public interest implications of this merger. In part D, we consider issues which arise because of the timing of this Application, which was filed after the indirect change of control had occurred.

B. The Public Interest

Wild Goose argues that the appropriate standard for analyzing the public interest in a transaction subject to § 854(a) is whether or not the transfer of

control is "adverse to the public interest."[7] However, Wild Goose then refers to the public interest criteria enumerated in § 854(c) and ties its public interest showing to the specific criterion listed there. This is useful, as the Commission has found that consideration of these criteria ensures assessment of a broad spectrum of important public interest concerns and provides a good gauge of the public interest under § 854(a). Thus, though a transaction, like this one, does not exhibit the financial attributes that mandate application of § 854(c) because no party has gross annual California revenues of $500,000,000 (U.S.), the Commission has used the § 854(c) criteria in its public interest assessment.[8][8]

The Application's impact assessment includes the following information. With financial resources approximately double those of AEC, the new EnCana reinforces the financial strength of Wild Goose. This is probably the most significant impact of the merger. Wild Goose and its parent were financially stable before, now they are even more stable. The Application states that the merger has not and will not have any direct impact on Wild Goose's customers, including either the quality of service to them or the quality of Wild Goose's management. Wild Goose asserts:

> " . . . the transaction did not result in any changes to the services provided by Wild Goose or to the rates or terms and conditions under which they are provided. Wild Goose will continue to provide unbundled firm and interruptible storage services to the public at market-based rates, exactly as authorized by the Commission." (Application at 12.)

As for impact on employees, Wild Goose has not implemented any lay-offs (it has only three full time employees in Butte County) and it does not

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[7] *See*, for example, *Quest Communications Corp.*, D.00-06-079, 2000 Cal. PUC LEXIS 645, *16.

[8] *Ibid.*

plan to do so. Neither has the merger affected its employees' benefits. With respect to shareholder concerns, since the shares of Wild Goose are not publicly traded, the transaction has not affected Wild Goose directly; at the holding company level, the majority of the shareholders of both AEC and PanCanadian voted to support the merger.

The Commission's jurisdiction over Wild Goose has not been affected in any significant way, either--Wild Goose does not ask that we transfer its CPCN to another entity; rather, Wild Goose will continue to hold the CPCN and will continue to offer natural gas storage services at market-based rates pursuant to D.97-06-091 and D.02-07-036, and all subsequent modifications of these decisions. We note that though EnCana, Wild Goose's current, ultimate parent, is a Canadian holding company, the same is true of AEC, Wild Goose's ultimate parent before the merger. Critically, the merger does not change the evidence noted in D.02-07-036, that Wild Goose, through its affiliates, does not control transportation services into California. Moreover, staff of the Commission's Energy Division have reported that Wild Goose has been complying with the various reporting requirements we ordered in D.02-07-036 (§ 583 affiliates' activities report, etc.) by including information for EnCana as well as AEC.[9]

In sum, then, the record indicates that the merger has resulted in no negative impacts on Wild Goose, its service quality, customers, employees, the local community, or on the ability of this Commission to regulated Wild Goose. The greater financial strength of EnCana appears to result in a net positive impact.

[9] D.02-07-036 also prohibits Wild Goose from engaging in any storage or hub services transactions with AEC or any affiliate owned or controlled by AEC and extends these bans to include any successor to AEC.

C. CEQA

Under the California Environmental Quality Act (CEQA) and Rule 17.1 of the Commission's Rules of Practice and Procedure, we must consider the environmental consequences of projects that are subject to our discretionary approval. (Pub. Resources Code § 21080.) It is possible that a change of ownership and/or control may alter an approved project, result in new projects, or change facility operations, etc. in ways that have an environmental impact.

By ruling on February 7, 2002, the assigned administrative law judge (ALJ) directed Wild Goose to supplement the record to clarify whether:

> EnCana intends to make any changes to Wild Goose's facilities or in its operations, which were not approved in D.02-07-036 and which are not discussed in this application, but which could have potential effects on the environment. (ALJ Ruling at 1.)

On February 20, 2003, Wild Goose filed the required, verified Supplemental Information on Intended Operations, which states that Wild Goose has embarked upon the expansion authorized in D.02-07-036 but has no plans or intentions to make any changes to its facilities or in its operations that have not already been approved as part of D. 02-07-036.

Based upon the record, the transfer of control at issue in this proceeding will have no significant effect on the environment for a number of reasons. The Wild Goose gas storage facilities will continue to be developed and operated as previously authorized by this Commission, all environmental mitigation measures contained in the certified EIRs will continue to apply, and all monitoring requirements and restrictions imposed in D.97-06-091 and D.02-07-036, which certified these EIRs, will continue. Therefore, the proposed project qualifies for an exemption from CEQA pursuant to § 15061(b)(3)(1) of the

CEQA guidelines and the Commission need perform no further environmental review. (See CEQA Guidelines § 1506(b)(3)(1).)

D. Failure to Obtain Prior Approval

We have concluded that the Application is in the public interest and requires no further review under CEQA. Problematically, however, this transaction was finalized prior to our review—EnCana exists and the indirect change of control over Wild Goose has occurred. Essentially, then, we are faced with a request for approval nunc pro tunc.[10]

Given our previous discussion, we see no reason not to approve the merger, but as we determined in D.03-05-033, the authority granted should apply prospectively, and not on a retroactive basis. As we state in D.03-05-033, the purpose of § 854 (a) is to enable the Commission to review a proposed acquisition, before it takes place, in order to take such action as the public interest may require.[11] Granting this application on a retroactive basis would thwart the purpose of § 854 (a).

Since we will not grant retroactive authority, the indirect change of control over Wild Goose is void under § 854 (a) for the period of time prior to the effective date of this decision. The Applicant is at risk for any adverse consequences that may result from their having completed the transfer of control without Commission authority.

As we consider the facts of this Application, we are mindful that the Commission cannot simply look the other way and ignore utility noncompliance

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[10] The phrase "nunc pro tunc," meaning "now for then," refers to those acts which are allowed to be done at a later time "with the same effect as if regularly done." (Blacks Law Dictionary (5th Revised ed. (1979), p. 964.)

[11] D.99-02-061, 1999 Cal. PUC LEXIS 56 *12; D.98-07-015, 1998 Cal. PUC LEXIS 526 *7; D.98-02-005, 1998 Cal.PUC LEXIS 320 *8; D.97-12-086, 1997 Cal. PUC LEXIS 1168 *8; and San Jose Water Co. (1916) 10 CRC 56, 63.

with the statutes of this state and with Commission rules and orders. We must act to discourage utilities from avoiding their legal duty, whether intentionally or inadvertently, and bypassing the Commission. The Commission underscored the importance of such action when it issued the *Affiliate Enforcement Rulemaking,* R. 98-04-009: "It is fundamental to the Commission's exercise of its powers and jurisdiction that the agency take reasonable steps to ensure that the utilities comply with its orders and rules." (*Mimeo.*, at p. 5.)[12]

In D.00-09-035 we held that our precedent of meting out lenient treatment to those who violate § 854 (a) had failed to deter additional violations; and we indicated that henceforth we would impose fines in order to deter future violations of § 854 (a).[13]

Section 2107 sets forth the parameters for maximum and minimum penalties:

> Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction,

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[12] *Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates Adopted By the Commission In Decision 97-12-088,* issued April 9, 1998.

[13] *See*, for example, *Application of PG&E*, D.99-02-062, 1999 Cal. PUC LEXIS 59 [where sales of customer facilities to those customers without preapproval attributed to utility's mistaken belief that § 851 did not apply to the sales and utility properly credited ratebase with all after-tax gains from the sales, approval granted nunc pro tunc and no penalty levied, consistent with ORA's recommendations]. Compare, for example, K*och Pipeline Co.*, D.99-08-007, 1999 Cal. PUC LEXIS 498 [where utility failure to seek prior approval under § 851 was inadvertent and sale was one very small part of multi-jurisdiction transaction, approval granted nunc pro tunc and $8,000 penalty levied considering lack of mitigating factors, such as benefit to ratepayers]; *NetMoves Corp.*, D.00-12-053, 2000 Cal. PUC LEXIS 1055 [where no harm to the public, utility failure to obtain preapproval under § 854 deemed serious, warranting a $5,000 penalty, considering utility's modest and declining financial resources].

> demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than twenty thousand dollars ($20,000) for each offense.

Section 2108 provides, in relevant part, that "in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

In determining the size of the penalty, where one is levied, the Commission has held that the size of the fine should be proportionate to the severity of the offense and has applied the criteria adopted in D.98-12-075, which issued in the *Affiliate Enforcement Rulemaking.* These criteria include: (1) the severity of the offense; (2) the conduct of the utility (before, during and after the offense); (3) the financial resources of the utility; (4) the totality of the circumstances related to the violation; and (5) the role of precedent.

Severity of the offense includes a consideration of the physical or economic harm caused to the victims or to the integrity of the regulatory process, unlawful benefits gained by the utility, and the number of violations. The conduct of the utility includes the utility's actions to prevent the violation, detect the violation, and disclose and rectify the violation. With respect to the financial resources of the utility, the Commission considers both the need for deterrence and constitutional limitations on excessive fines. Consideration of the totality of the circumstances requires the Commission to look at the unique facts of each case, which may mitigate or exacerbate the degree of wrongdoing, in the furtherance of the public interest.

When we apply these criteria to the facts presented by this Application, we reach the following assessment. As we explain above, we do not find compelling Wild Goose's argument that the holding company merger did not result in a change of control under § 854(a). Moreover, recognizing, as

Wild Goose does, the Commission's history of case-by-case assessment in this area, and given the factual differences that underlie the range of decisions the Commission has reached, Wild Goose acted at its peril when it determined that it did not need Commission authority for the change of control.[14] The offense, failure to comply with § 854(a), is serious—so serious that the statute, itself, provides that a transaction pursued without prior Commission authorization is void and of no effect.

We are not aware that Wild Goose did anything to bring to the Commission's attention the prospect of a merger at the holding company level. This omission is disturbing, particularly considering that at the time Wild Goose had pending before us an application for amendment of its CPCN and for expansion of its existing facilities. However, when we learned in trade press reports of the pending transaction and, in D.02-07-036, directed Wild Goose to file the instant Application, Wild Goose promptly complied. Furthermore, Wild Goose's compliance with the reporting requirements we ordered in D.02-07-036 exhibits no intent to evade regulatory oversight in that regard since Wild Goose has supplied information about EnCana and its affiliates. Likewise, Wild Goose's customers, ratepayers at large, and the broader public interest all appear unharmed by the transaction. In these respects, this matter resembles K*och Pipeline Co.* and *NetMoves Corp.*, *supra,* where we imposed penalties, respectively, of $8,000 and $5,000.

The financial resources of Wild Goose and its parent corporations are substantial and Wild Goose touts the increased financial stability of the company as a whole as the primary benefit of the merger. Though the financial statements

[14] On the other hand, under a different set of facts that nonetheless caused it to question where § 854 was applicable, Lodi appropriately chose to file for Commission review. We approved that indirect change of control in D.03-02-071.

of Wild Goose are not public, they have been filed under seal with the Application; the financial statements of AEC, PanCanadian and EnCana are all part of the public filing. As we have already seen above, EnCana, the new, multi-billion dollar holding company, has international economic interests that extend beyond the United States and Canada. This strong and wide-reaching financial picture militates for a more substantial penalty than imposed in either K*och Pipeline Co.,* which concerned a small part of a multi-million dollar, multi-state sale of assets, or *NetMoves Corp.,* where the penalty reflected the utility's reduced financial straits.[15]

We turn next to §§ 2107 and 2108, which prescribe how a penalty shall be calculated. For illustrative purposes, we will compute both the lowest possible penalty (at $500 per day) and the highest (at $20,000 per day). Since the merger was approved in Canada on April 5, 2002 and Wild Goose filed its Application on September 3, 2002, Wild Goose was in violation of the Public Utilities Code for 151 days. However, since D.02-07-036, which issued on July 17, 2002, allowed Wild Goose 45 days to prepare and file this Application, we will reduce the violation period accordingly. Since the 45th day was the Saturday of a three-day holiday weekend, the filing actually was not due until 48 days later, on Tuesday, September 3, 2002. The resulting penalty period is 103 days and the penalty range is $51,500 to $2,060,000 (U.S.).

D.98-12-075 cautions that the size of a penalty should be adjusted to achieve the objective of deterrence without becoming excessive. Accordingly,

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[15] In addition, *Koch Pipeline Co.,* which issued before the *Affiliate Enforcement Rulemaking's* D.98-12-075, and *NetMoves Corp.,* which issued after, both appear to assume single, non-continuing violations. *Koch Pipeline Co.* does not apply § 2108 (which requires each day's continuing violation to count in the penalty calculation) to violation of § 851 in the sale of the pipeline at issue in that proceeding and *NetMoves Corp.* does not discuss § 2108.

considering the size of the penalties assessed in K*och Pipeline Co.* and *NetMoves Corp.*, and the similar facts here, we will levy a penalty of $51,500, which is at the low end of the range. We stress that we are strongly influenced by the lack of economic harm to customers and by Wild Goose's compliance with D.02-07-036's reporting requirements.

The penalty shall be paid to the General Fund as detailed in the ordering paragraphs. We reiterate that unless and until modified, all terms and conditions of D.97-06-091 and D.02-07-036 will continue to apply to Wild Goose. Likewise, Wild Goose must continue to operate in conformance with its filed tariff and with any subsequent amendments of that tariff.

V. Miscellaneous Procedural Matters

Notice of this Application appeared in the Commission's Daily Calendar on September 13, 2002. The Commission has received no protests.

In Resolution ALJ 176-3095, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. We confirm those determinations. As no hearing is required, pursuant to Rule 6.6 of the Commission's Rules of Practice and Procedure, Article 2.5 of the Rules ceases to apply to this proceeding.

VI. Comments on Draft Decision

This is an uncontested matter in which the decision grants the relief requested but subject to the penalty ordered. Accordingly, the public comment provisions of § 311(g)(1) and Rule 77.7(b) of the Commission's Rules of Practice and Procedure apply.

VII. Assignment of Proceeding

Loretta Lynch is the Assigned Commissioner and Jean Vieth is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Application is unopposed.

2. Wild Goose is an independent natural gas storage provider regulated as a public utility by this Commission.

3. The merger of AEC and PanCanadian to form EnCana has resulted in the indirect change of control over Wild Goose.

4. The merger occurred by means of a share exchange whereby AEC shareholders received 1.472 shares of PanCanadian common stock in return for each share of AEC common stock shared they held.

5. Wild Goose did not seek authorization prior to September 3, 2002 for indirect change of control over Wild Goose.

6. The indirect change of control over Wild Goose is one part of a multi-billion dollar, multi-jurisdiction transaction, which has combined two holding companies and their subsidiaries to form EnCana. EnCana is essentially twice as large as either AEC or PanCanadian standing alone, with sizeable net assets and shareholders' equity of $22.1 billion dollars (Canadian) and $12.96 billion dollars (Canadian), respectively.

7. AEC's shares are no longer publicly traded; instead they are privately held at the new, fifth-tier by EnCana, which is publicly traded.

8. Wild Goose ties its public interest showing to the specific criterion listed in § 854(c), even though no party to this transaction has gross annual California revenues of $500,000,000.

9. The EnCana merger has resulted in no negative impacts on Wild Goose, its service quality, customers, employees, the local community, or on the ability of this Commission to regulated Wild Goose. The greater financial strength of the EnCana appears to result in a net positive impact.

10. The change of indirect control over Wild Goose is a project subject to environmental review pursuant to the California Environmental Quality Act.

11. Wild Goose has embarked upon the expansion authorized in D.02-07-036 but has no plans or intentions to make any changes to its facilities or in its operations that have not already been approved as part of D. 02-07-036.

12. It can be seen with reasonable certainty that the change of indirect control over Wild Goose will not have a significant effect on the environment. This is the independent judgment of the Commission.

13. Failure to seek prior approval of the change of control over Wild Goose is a serious violation that continued for a period of 103 days.

14. Though Wild Goose appears to have done nothing to bring to the Commission's attention the prospect of a merger at the holding company level, Wild Goose filed this Application promptly when directed to do so.
Wild Goose's has complied with the reporting requirements ordered in D.02-07-036 by including information about EnCana and its subsidiaries.
Wild Goose's customers, ratepayers at large, and the broader public interest all appear unharmed by the transaction.

15. The financially strong position of Wild Goose and its corporate parents warrants a more substantial penalty than imposed in either Koch Pipeline Co. or NetMoves Corp.

16. Under the circumstances, it appropriate to calculate the penalty on the basis of a violation continuing for 103 days at $500 per day, for a total penalty of $51,500.

17. No hearing is necessary.

Conclusions of Law

1. The indirect change of control over Wild Goose occasioned by merger of AEC and PanCanadian to form EnCana is the kind of transaction subject to § 854(a).

2. The indirect change of control over Wild Goose occasioned by merger of AEC and PanCanadian to form EnCana should be approved on a prospective basis.

3. Retroactive approval of the transfer of control should be denied as described therein.

4. We must act to discourage parties from avoiding their statutory duty and bypassing the Commission when pursuing mergers or other changes of control, direct or indirect.

5. It is fundamental to the exercise of our powers and jurisdiction that we take reasonable steps to ensure that the utilities comply with our orders and rules.

6. We have considered the severity of the violation, the conduct of the utility, the financial resources of the utility, and the totality of the circumstances related to the violation, and Commission precedent in determining that penalty should be levied.

7. We have calculated the penalty as prescribed by § 2107 and § 2108.

8. The penalty of $51,500 is an equitable outcome and balances the objectives of effective deterrence and avoidance excess penalties.

9. Following the change of indirect control, Wild Goose will continue to be bound by the terms of its CPCN, by all the requirements and conditions mandated in D.97-06-091 and D.02-07-036, as modified by subsequent Commission decisions, and by the tariff filed with the Commission, as approved and subsequently modified by any approved amendments.

10. The preliminary determinations in Resolution ALJ 176-3095 should be confirmed.

11. Article 2.5 of the Commission's Rules of Practice and Procedure ceases to apply to this proceeding.

12. This transfer of control qualifies for an exemption from the California Environmental Act (CEQA) under CEQA Guidelines § 1506(b)(3)(1) and therefore, additional environmental review is not required.

13. This order should be effective immediately to accomplish compliance with the Public Utilities Code.

O R D E R

IT IS ORDERED that:

1. Application (A.) 02-09-006 of Wild Goose Storage, Inc. (Wild Goose) is approved, as further provided in these Ordering Paragraphs.

2. The indirect transfer of control over Wild Goose to EnCana Corporation (EnCana) is granted to the extent it requests authority effective as of the date of this order. Authority is denied to the extent it requests retroactive authority for the transfer of control.

3. A penalty of a penalty of $51,500 is assessed for violation of Public Utilities Code § 854(a) but one half of the penalty is suspended, in consideration of mitigating factors discussed in this decision. The penalty is due and payable to the State of California General Fund within ten (10) days of the date this decision is mailed to the service list. Proof of payment shall be filed and served on the service list and shall be provided to the Director of the Energy Division within five days of payment.

4. The transfer of control qualifies for an exemption from the California Environmental Act (CEQA) under CEQA Guidelines § 1506(b)(3)(1) and therefore, additional environmental review is not required.

5. Wild Goose and its owners shall continue to be bound by all terms and conditions of Wild Goose's certificate of public convenience and necessity, as granted by Decision (D.) 97-06-091 and modified by subsequent decisions of the Commission, including D.02-07-036 and by the tariff filed with the Commission, as approved and subsequently modified by any approved amendments.

6. A.02-09-006 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Proposed Decision of Commissioner Brown on all parties of record in this proceeding or their attorneys of record.

Dated June 5, 2003, at San Francisco, California.

/s/ VANA WHITE
Vana White

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.